Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone Cooperative, Inc.	)	
for Order Declaring it to be an Incumbent Local	)	WC Docket No. 02-78
Exchange Carrier in Terry, Montana Pursuant to	)	
Section 251(h)(2)	)	
	)	

COMMENTS OF ACS OF ANCHORAGE, INC., ACS OF ALASKA, INC., AND ACS OF FAIRBANKS, INC.

ACS of Anchorage, Inc. ("ACS-AN"), ACS of Alaska, Inc. ("ACS-AK"), and ACS of Fairbanks, Inc. ("ACS-F") (collectively, the "ACS LECs"), through counsel, hereby submit their initial Comments in response to the Notice of Proposed Rulemaking the above-captioned proceeding (the "*NPRM*").

I. INTRODUCTION AND SUMMARY

The ACS LECs provide communications services to the Anchorage, Fairbanks, and Juneau, Alaska study areas. They are incumbent local exchange carriers ("ILECs") subject to "dominant" carrier regulation in each of their markets.[1] Competition has thrived in each of the ACS LECs' study areas, with competitive local exchange carriers ("CLECs") winning substantial market share in each market. In the Anchorage market, ACS-AN currently serves less than 50 percent of the local exchange market; ACS-F currently serves approximately 70 percent of the Fairbanks market; and ACS-AK serves approximately 70 percent of the Juneau market.

[1] The ACS LECs recently were granted temporary non-dominant treatment for retail local services solely for tariff filing purposes.

The ACS LECs urge that the Commission find that any carrier that falls below 50 percent market share should be relieved of dominant carrier regulation in that market. Based on the fact that Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers") has captured approximately 93 percent of the local exchange market in Terry, Montana, Qwest certainly should be relieved of dominant carrier regulation in that market.[2] The ACS LECs stress, however, that the Section 251(h)(2) standard serves a narrow purpose of determining whether a carrier should be classified as an ILEC, not whether a carrier is dominant or non-dominant. In making its findings, the Commission should not blend the different concepts of ILEC regulation versus dominant carrier regulation. The Commission should determine whether to impose or relieve carriers of regulatory obligations on a case-by-case basis in order to best advance the specific policy goals of the statutory requirements or regulations at issue.

II. A CARRIER THAT SERVES LESS THAN 50 PERCENT OF A MARKET SHOULD NOT BE REGULATED AS A DOMINANT

In the NPRM, the Commission asks whether, "if . . . a competitive LEC has satisfied the requirements of section 251(h)(2), . . . the incumbent LEC should no longer be subject to dominant carrier regulations."[3] The answer is "Yes." The goal of the Commission's dominant carrier classification was to ensure that carriers with market power could not raise prices or restrict output in a manner harmful to consumers.[4] The Commission previously has lifted dominant carrier regulation when it found a previously dominant carrier to have lost

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2 The ACS LECs take no position in these Comments as to whether it is appropriate to view the Terry exchange as a "market" for the purposes of this analysis.

3 *NPRM* at ¶ 13.

4 *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, ¶ 4 (1980).

sufficient market share as to be incapable of exercising market power as so defined.[5] In the case at hand, in which Qwest serves fewer than five percent of the lines in the Terry exchange, it would be absurd to continue to regulate Qwest as "dominant."[6]

It should be self-evident that any time a carrier has "substantially replaced" the ILEC in a market, the ILEC by definition no longer enjoys market power and therefore cannot be deemed "dominant" any longer. However, an ILEC should not be required to demonstrate that Section 251(h)(2) of the Communications Act of 1934, as amended (the "Act"), has been satisfied to be relieved of dominant carrier regulation. Section 251(h)(2) is a narrowly focused statutory provision, aimed at determining whether a carrier should be treated as an ILEC under the Act. The Commission should utilize a separate test for determining whether a carrier is dominant under the Commission's rules. Specifically, the Commission should establish a presumption that any time an ILEC serves less than 50 percent of the local exchange market, the ILEC is not dominant.

Perhaps the most prominent Commission precedent regarding carrier "dominance" are the Commission's orders finding AT&T non-dominant in the domestic and international long distance markets. The Commission found AT&T to be non-dominant even

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5 *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Domestic Non-dominant Order*"); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963 (1996) ("*AT&T International Non-dominant Order*"); *Comsat Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Policies and Rules for Alternative Incentive Based Regulation of Comsat*, 13 FCC Rcd 14083 (1998).

6 *See supra* note 2.

though it still held a majority market share.[7] AT&T served over a 55 percent share of the U.S. domestic interstate long-distance market and nearly 60 percent in the international long distance market.[8] The Commission found particularly significant AT&T's rapid drop in market share over a 10-year period.

The Commission's AT&T orders provide more than ample support for finding an ILEC to be non-dominant in any local exchange market in which its market share has fallen below 50 percent. The Telecommunications Act of 1996 ushered in competition in the local exchange services market only eight years ago. Where an ILEC has lost over half of the local exchange market in only eight years, it has lost any position of dominance in that market.

This is precisely the situation in Anchorage, Alaska. At this time, there is no justification for continuing to regulate ACS-AN as dominant. ACS-AN has lost more than 50 percent market share, primarily to facilities-based competition. Among the CLECs serving each of the ACS LECs' markets is General Communication, Inc. ("GCI"). GCI, the incumbent cable television operator, serves approximately 45 percent of the Anchorage market. It serves a subset of its customers over exclusive facilities over which GCI is not required to give ACS or its other competitors access. GCI is in the process of transitioning its entire customer base to its own circuit-switched cable telephony plant.

ACS-AN has responded by cutting costs, lowering prices, and deploying new services, but it is limited in its ability to tailor its offerings to the market because of heavy dominant carrier regulation at both the wholesale and retail levels. This continuing burden on

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7 *AT&T Domestic Non-dominant Order* at ¶ 67 (55.2 and 58.6 percent market share in terms of revenues and minutes respectively); *AT&T International Non-dominant Order* at ¶ 33 (59 percent market share in the international message toll service (IMTS) market).

8 *Id.*

ACS-AN may help GCI but it confers no benefit on consumers. Consumers would be far better served by the elimination of unnecessary restrictions on head-to-head competition between ACS-AN and GCI. If ACS-AN should try to use any new freedoms to raise prices or restrict output, GCI has already demonstrated its ability to undercut ACS-AN on price and offer service where ACS-AN cannot. Current market conditions thus demonstrate that ACS-AN lacks market power and should no longer be classified as dominant in the Anchorage, Alaska market.[9] With five percent market share, Qwest presents a similar case. Thus, the Commission should establish a presumption that ILECs with less than a 50 percent market share should no longer be subject to dominant treatment.

III. THE COMMISSION SHOULD REVIEW REGULATORY TREATMENT OF A CARRIER AS AN ILEC OR A CLEC ON A CASE-BY-CASE BASIS

Loss of "dominance" by one carrier does not necessarily mean that another carrier must be classified as dominant or as an ILEC. The fact that AT&T was found to be non-dominant did not require the Commission to classify another carrier as dominant and subject to dominant carrier regulation. Rather, at the time of the Commission's findings (and today) the U.S. long distance market was subject to effective competition. The ACS LECs respectfully submit that CLEC/ILEC classification should be determined separate from the dominant/non-dominant classification of the ILEC (or a CLEC).

Classification of a carrier has a great many implications under the Act. Sections 224, 251, 252, and 254, and the Commission's rules that implement these sections, exemplify the different obligations imposed on ILECs compared to other carriers. Section 251(h)(2) of the Act

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[9] Although the Commission classifies carriers as "dominant" or "non-dominant" only as to the provision of interstate services, the ACS LECs urge the Commission to consider the local exchange and exchange access market as a whole, to guide the states in making consistent regulatory classifications for intrastate services as well.

provides a narrowly tailored test for determining whether a carrier is an ILEC. The ACS LECs believe the Commission must consider all the implications of classifying a carrier as an ILEC before ruling on a Section 251(h)(2) petition. In the petition that inspired the *NPRM*, it appears that Mid-Rivers seeks classification as an ILEC solely for the purposes of receiving increased universal service support. If the Commission finds that Mid-Rivers is an ILEC for universal service purposes, however, the Commission should apply this classification not only to receipt of universal service funds, but also to universal service *obligations* typically applicable to ILECs.

This does not necessarily mean that the Commission should classify Mid-Rivers as an ILEC for all purposes. Different considerations should be weighed before relieving or imposing different forms of regulation. For example, the ACS LECs have proposed a separate, three-part test for determining whether an ILEC should no longer be subject to Section 253(c)(3) if the Act.[10] The Commission must examine the policy reasons underlying regulations and examine requests for regulatory relief to best achieve those policies.

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[10] Specifically, the ACS LECs proposed that a competitive carrier is not impaired without mandatory access to UNEs if that carrier:

> **(1)** has 30 percent or more of the local exchange market served by the ILEC;
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> **(2)** has deployed distribution facilities that pass 60 percent or more of the customers in the market (regardless of technology); and
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> **(3)** is actually providing local exchange services over some portion of its own facilities in that market.

See Reply Comments of ACS of Anchorage, Inc., ACS of Alaska, Inc. and ACS of Fairbanks, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 19, 2004).

IV. CONCLUSION

Commission precedent demonstrates that the Commission should relieve any carrier of dominant carrier regulation that holds less than a 50 percent market share. However, the ACS LECs urge the Commission to recognize that Section 251(h)(2) serves a very specific purpose – determining whether a carrier should be classified as an ILEC, not whether a carrier should be regulated as dominant. The Commission should review application of various ILEC and dominant carrier regulations on a case-by-case basis in order to promote the policy goals underlying the Act and Commission regulations.

Respectfully submitted,

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